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Justice

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	) No. R-15-0018
	)
PETITION TO AMEND RULES 31, 34,	) ARIZONA ATTORNEYS FOR
38, 39, and 42, Rules of the Supreme	) CRIMINAL JUSTICE (“AACJ”)
Court	) COMMENT ON AND OBJECTION TO
	) THE PROPOSED ADOPTION OF
	) COMMENT 2 TO ETHICAL RULE 4.2
	)
	)
	)

**Background**

On January 9, 2015, the Committee on the Review of Supreme Court Rules Governing Professional Conduct and the Practice of Law (the “Timmer Committee”) filed a Petition, among other things, to add Comment 5 to ER 4.2 of the American Bar Association’s Model Rules of Professional Conduct (“Comment 5”) as Comment 2 to Ethical Rule 4.2 of the Arizona Rules of Professional Conduct (“Proposed Comment 2”). [In *the Matter of: PETITION TO AMEND RULES 31, 34, 38, 39, and 42*, Rules of the Supreme Court, submitted January 9, 2015 (the “Petition”).]

The Petition, however, urged the adoption of Comment 5 with amended language and not as it is actually written in Comment 5. For whatever reason, , some of the members of the Timmer Committee subgroup who reviewed the proposed adoption of Comment 5 understood they were adopting *verbatim* the language of Comment 5, and did

1 not understand they were adopting a revised version, which now appears as Proposed  
2 Comment 2 in the Petition.

### 3 **Request**

4 Arizona Attorneys for Criminal Justice (“AACJ”) urges the Court to reject the  
5 adoption of Proposed Comment 2 and either (i) adopt Comment 5 *verbatim* as it is  
6 written, (ii) make no changes or additions to the comments to ER 4.2 of the Arizona  
7 Rules of Professional Conduct, or (iii) adopt the proposal of the State Bar and only adopt  
8 the first and fourth sentences of Proposed Comment 2.

### 9 **Interest of AACJ**

10 AACJ, the Arizona state affiliate of the National Association of Criminal Defense  
11 Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally  
12 accused and to those attorneys who defend the accused. AACJ is a statewide not-for-  
13 profit membership organization of criminal defense lawyers, law students, and associated  
14 professionals dedicated to protecting the rights of the accused in the courts and in the  
15 legislature, promoting excellence in the practice of criminal law through education,  
16 training and mutual assistance, and fostering public awareness of citizens’ rights, the  
17 criminal justice system, and the role of the defense lawyer.

### 18 **Discussion**

19 Rule 4.2 provides that “[i]n representing a client, a lawyer shall not communicate  
20 about the subject of the representation with a party the lawyer knows to be represented by  
21 another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is  
22 authorized by law to do so.” This is virtually identical to ER 4.2 of the Annotated Model  
23 Rules of Professional Conduct.”<sup>1</sup> Comment 1 to ER 4.2 of the Model Rules explains,  
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26  
27 <sup>1</sup>“In representing a client, a lawyer shall not communicate about the subject of the  
28 representation with a party the lawyer knows to be represented by another lawyer in the  
matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by  
law or a court order.”

1 “[t]his Rule contributes to the proper functioning of the legal system by protecting a  
2 person who has chosen to be represented by a lawyer in a matter against possible  
3 overreaching by other lawyers with the client-lawyer relationship and the uncounselled  
4 disclosure of information relating to the representation.” [Comment 1, to ER 4.2,  
5 Annotated Model Rules of Professional Conduct]

6 Although ER 4.2 is a mandatory no-contact rule, there are two exceptions: (1)  
7 where the contacting lawyer has the consent of the other lawyer (i.e., the lawyer of the  
8 person to be contacted) or (2) the contacting lawyer is “authorized by law to do so.” It is  
9 the latter “authorized by law” exception that has proven to be most challenging,  
10 particularly in the context of criminal matters.

11 Comment 5 addresses the authorized-by-law exception. It reads as follows:  
12

13 [5] Communications *authorized by law* may include  
14 communications by a lawyer on behalf of a client who is exercising a  
15 constitutional or other legal right to communicate with the government.  
16 Communications authorized by law may also include investigative  
17 activities of lawyers representing governmental entities, directly or  
18 through investigative agents, prior to the commencement of criminal or  
19 civil enforcement proceedings. *When communicating with the accused in*  
20 *a criminal matter, a government lawyer must comply with this Rule in*  
21 *addition to honoring the constitutional rights of the accused.* The fact that  
22 a communication does not violate a state or federal constitutional right is  
23 insufficient to establish that the communication is permissible under this  
24 Rule. [Comment 5 to Rule 4.2, Annotated Model Rules of Professional  
25 Conduct (emphasis added)]

26 Proposed Comment 2 reads as follows (with the amendments shown as deleted  
27 and amended):

28 [2] Communications *authorized by law* may include  
communications by a lawyer on behalf of the client who is exercising a  
constitutional or other legal to communicate with the government.  
Communications authorized by law may also include investigative  
activities of lawyers representing governmental entities, directly or  
through investigative agents, prior to the commencement of criminal or  
civil enforcement proceedings. When communicating with the accused in

1 a criminal ~~matter~~ prosecution about a matter other than the criminal  
2 prosecution, a government lawyer must comply with this Rule in addition  
3 to honoring the constitutional rights of the accused. The fact that a  
4 communication does not violate a state or federal constitutional right is  
5 insufficient to establish that the communication is permissible under this  
6 Rule. [Proposed Comment 2 (as amended) (emphasis added)]

7 It is the underlined language that is both confusing and problematic. Proposed Comment  
8 2 seems to suggest that a prosecutor would be permitted to talk to an accused about his  
9 pending criminal prosecution, but would need to comply with ER 4.2 if he wanted to  
10 discuss matters other than those encompassed by the pending criminal prosecution. This  
11 would be an absurd result and would eviscerate the protection provided by ER 4.2 at a  
12 point when the accused needs it most, but it is what this language suggests.

13 Because of the confusion and possible problematic application of Proposed  
14 Comment 2, AACJ recommends that Proposed Comment 2 as written be rejected and the  
15 original language of Comment 5 be left intact, that there be no change at all, or that only  
16 the first and fourth sentence of Proposed Comment 2 be adopted.<sup>2</sup>

17 The issue of what communications are authorized by law is not well-settled and  
18 continues to be the subject of controversy and disagreement. See Hazard and Hodes, *Law*  
19 *of Lawyering*, 4<sup>th</sup> Edition, § 41.14 (2014) (“The most complicated and controversial  
20 aspect of Rule 4.2 is its application in cases where a government lawyer in a prosecuting  
21 attorney’s office or in a regulatory enforcement agency seeks to deal with a defendant or  
22 target who is known to be represented by counsel.”). The instances in which ER 4.2  
23 could be implicated in the context of a criminal investigation are too numerous to recount  
24 here and the complexities regarding what is authorized by law and what is ethical are  
25 likewise fact intensive and context dependent. What is the setting of the

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26 <sup>2</sup> The adopted comment would thus read as follows: “Communications authorized by law  
27 may include communications by a lawyer on behalf of the client who is exercising a  
28 constitutional or other legal right to communicate with the government. The fact that a  
communication does not violate a state or federal constitutional right is insufficient to  
establish that the communication is permissible under this Rule.”

1 communications? Does the accused or suspect have a lawyer? Has there been a formal  
2 accusation? Does the prosecutor know the suspect has a lawyer?

3 By way of example, communications by a government lawyer with the accused or  
4 a potential accused in a criminal matter at least in one sense are authorized by law only to  
5 the extent they do not violate that person's state or federal constitutional rights. If a  
6 citizen is detained in a custodial setting because he or she is suspected of criminal  
7 wrongdoing, but before the Sixth Amendment right to counsel has attached, a lawyer for  
8 the government or that lawyer's agent must comply with *Miranda v. Arizona*, 384 U.S.  
9 436 (1966), before initiating any interrogation.<sup>3</sup> Presumably, if this *Miranda* advisory is  
10 complied with, and the citizen opts to speak, any ensuing interrogation is constitutional.

11  
12 If the same citizen is suspected of wrongdoing, but there is a non-custodial contact  
13 by a government lawyer or his or her agent, and the citizen opts to answer questions by  
14 the government lawyer or agent, this interrogation is also presumed constitutional even  
15 without any kind of *Miranda* advisory warning.<sup>4</sup> But, as discussed more fully below,  
16 such a contact may violate ER 4.2 if the citizen is known to be represented by counsel in  
17 the matter.

18 Once the Sixth Amendment right to counsel has attached, of course, a government  
19 lawyer's ability to elicit information from an accused is much more limited. *See, e.g.,*  
20 *Brewer v. Williams*, 430 U.S. 387 (1977). Thus, information deliberately elicited from an  
21 accused after the Sixth Amendment right to counsel has attached is, in many instances,  
22 inadmissible at trial because it was not lawfully obtained. *See Maine v. Moulton*, 474  
23 U.S. 159 (1985); *United States v. Henry*, 447 U.S. 264 (1980). Thus, communications  
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25 <sup>3</sup> In a custodial setting, law enforcement officers must inform citizens that they have the  
26 right to remain silent, their statements may be used against them, they have the right to  
27 the presence of an attorney during questioning, and if they cannot afford an attorney one  
28 will be appointed for them.

<sup>4</sup> That citizens have the rights afforded by *Miranda* even without the advisory and in any  
setting is something of which almost all of them are unaware.

1 with an accused or a potential accused that are unconstitutional are not authorized by law  
2 and, therefore, may violate ER 4.2, and vice versa.

3       There are also situations in which an accused or a suspect may be lawfully  
4 contacted by a government lawyer in a manner that does not violate the constitution, but  
5 that contact could still violate ER 4.2. For example, Citizen K is the vice-president of a  
6 health-care provider that the government suspects of submitting false claims. Citizen K  
7 has a lawyer who has learned that government agents have contacted persons regarding  
8 the billing practices of Citizen K's company. Citizen K's lawyer notifies the prosecution  
9 offices that are associated with the investigation that Citizen K is represented by counsel  
10 and that any communications with Citizen K are to be done through counsel. A few  
11 weeks later, Citizen K is approached by an agent in a non-custodial setting and asks  
12 Citizen K if he will answer a few questions about his health care business. The agent has  
13 been made aware by the prosecutor that Citizen K is represented by counsel. Citizen K's  
14 lawyer is not aware of the contact. Here, there is perhaps no constitutional violation, but  
15 ER 4.2 clearly appears to prohibit this communication (on the long-observed assumption  
16 that a lawyer may not do through another what the lawyer is prohibited from doing  
17 herself).

### 18 **Conclusion**

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20       One of the goals of ER 4.2, particularly in a criminal matter, is to ensure that  
21 communications with a person known to be represented by counsel in a matter by another  
22 lawyer with an interest in that matter be completely above board and ethical either  
23 because they are done with the consent of the person's lawyer or they are authorized by  
24 law. There are, however, instances in which a communication may be lawful, but not  
25 ethical. There is nothing in Proposed Comment 2 that will shed light on what is  
26 authorized by law or ethical for a government lawyer to do in any given situation.<sup>5</sup>

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27  
28 <sup>5</sup> We understand this does not provide a bright line for prosecutors, but we do not believe  
in this context a bright line can be drawn.

1 Accordingly, the Court should reject the adoption of Proposed Comment 2 and either  
2 adopt Comment 5 *verbatim* as it is written, make no change or additions to the comments  
3 to ER 4.2 of the Arizona Rules of Professional Conduct, or adopt the proposal of the  
4 State Bar, which is to adopt only the first and fourth sentences of Proposed Comment 2.

5 RESPECTFULLY SUBMITTED on May 19, 2015

6 ARIZONA ATTORNEYS FOR CRIMINAL  
7 JUSTICE

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14 This Comment e-filed this  
15 19th day of May, 2015 with:

16 Supreme Court of Arizona  
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18 Phoenix, AZ 85007

19 Copies of this Comment  
20 mailed this date to:

21 Honorable Ann A. Scott Timmer  
22 Chair, Committee on the Review of  
23 Supreme Court Rules Governing  
24 Professional Conduct  
25 and the Practice of Law  
26 Justice, Arizona Supreme Court  
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28 1501 West Washington  
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s:/ B. Wolcott